RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT - 6 2017
OFFICE OF THE CLERK

No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amicus Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITION 4

I. The Business Relationships Between Motor Carriers and Independent Owner-Operators Are Crucial to the Trucking Industry, and This Court's Review Is Necessary to Resolve the Split Among the Circuits on the FAA's Applicability to Them. 4

II. Review Is Warranted Because the Decision Below Undermines the Federal Policy Favoring Arbitration, to the Detriment of Motor Carriers and Independent Owner-Operators. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 9, 10

Am. Trucking Ass'ns, Inc. v. *United States*,
344 U.S. 298 (1953) 5

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) 2

Boomer v. *AT&T Corp.*,
309 F.3d 404 (7th Cir. 2002) 11

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001) 2

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*,
460 U.S. 1 (1983) 4

Rent-A-Center, W., Inc. v. *Jackson*,
561 U.S. 63 (2010) 3

Stolt-Nielsen S. A. v. *AnimalFeeds Int'l Corp.*,
559 U.S. 662 (2010) 9

Transamerican Freight Lines, Inc. v. *Brada Miller Freight Sys.*,
423 U.S. 28 (1975) 6

Statutes and Regulations

49 C.F.R. § 376 4

9 U.S.C. 1 ..... *passim*

49 U.S.C. 14102 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Y2K Act of 1999, Pub. L. No. 106-37
§ 2(a)(3)(B)(iv) 8

Other Authorities

American Trucking Associations, *American Trucking Trends* (2017) 11

Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*,
47 Fed. Reg. 53858 (Nov. 30, 1982) 4

H.R. Rep. No. 68-96 (1924).....8

H.R. Rep. No. 97-542 (1982).....9

OOIDA: Who We Are,
http://www.ooida.com/WhoWeAre 5

Prime Inc. Company History,
http://www.primeinc.com/company-history 7

Philip J. Romero, ***The Economic Benefits of Preserving Independent Contracting*** 30 (Sept. 2011),
http://www.cbrt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf.....6

Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008).....10, 11

TABLE OF AUTHORITIES

(continued)

Page(s)

U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), http://www.census.gov/prod/ec02/ec02tv-us.pdf 5

Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251 (2006) 11

Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013.....7

INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

Many of ATA's members contract with owner-operators—independent businesspersons who own one or more trucks and lease them to motor carriers, and either operate them themselves or supply drivers—to haul freight for them. And in many such arrangements, carriers and owner-operators enter into agreements to arbitrate disputes that may arise during the course of their business relationship. By agreeing to arbitrate, motor carriers and owner-operators alike avoid costly and protracted litigation, instead committing to rely on what both Congress and the courts have repeatedly endorsed as an efficient,

---

* After timely notification, petitioner and respondent consented to the filing of this brief, and their consent letter has been filed with the Clerk's office. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

fair, and less adversarial means of dispute resolution. And they do so in the expectation that the Federal Arbitration Act (FAA) will require that those commitments be honored. Because the decision below renders those arbitration agreements unenforceable under the FAA, ATA and its members have a strong interest in this Court's review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly explained that "[t]he overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 334 (2011). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. That exception means that if motor carriers and their truck driver ***employees*** include an agreement to arbitrate disputes *in their employment contracts*, they cannot expect those agreements to be enforced under the FAA. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("Section 1 exempts from the **FAA** only contracts of employment of transportation **workers.**").

Nevertheless, the FAA plays an important role in other contractual relationships regularly entered into by motor carriers. In particular, many motor carriers frequently contract with independent businesses to haul cargo on their behalf. Often, motor carriers and their independent contractors will agree to arbitrate any disputes that arise between them (including, in some cases, the question whether a given dispute is arbitrable), with the expectation that the FAA will require them to honor those agreements.

The First Circuit's decision upends that expectation. As Petitioner explains, the decision below exacerbates an existing circuit split on the question whether parties can agree to let the arbitrator decide whether the Section 1 exception applies, and creates a new split in holding that the Section 1 exemption applies not just to agreements between motor carriers and their employees, but also to agreements between motor carriers and independent businesses that provide cargo-hauling equipment and services. Pet. 7-11.

Resolving the conflicts among the circuits on both of the questions presented in the petition is of broad importance to the trucking industry, which relies heavily on independent owner-operators to meet demand. The First Circuit's holding that applicability of the Section 1 exemption is always a question for the court, even when the parties expressly delegate questions of arbitrability to the arbitrator, Pet. App. 16a, would effectively nullify the advantages of arbitration in misclassification disputes—*i.e.*, disputes that turn on whether a given owner-operator is properly classified as an employee or an independent contractor—because in such cases the court's resolution of the gateway question is "so bound up" with the merits of the dispute as to constitute "the entire ball game." ***Rent-A-Center, W., Inc.*** v. ***Jackson,*** 561 U.S. 63, 87 (2010) (**Breyer, J.**, dissenting). **Given** the significant role of independent small businesses in the trucking industry, resolving the conflict among the circuits on that question alone would be enough to warrant review here.

But the First Circuit went much further, holding that *even if* the relationship between an owner-operator and a motor carrier is that of a bona fide

independent contractor, the Section 1 exemption for transportation-worker "contracts of employment" nevertheless applies. Pet. App. 33a. This sweeping, idiosyncratic holding means that owner-operators and carriers who agree to arbitrate disputes can *never* expect those agreements to be enforced under the FAA in cases brought within the First Circuit—despite the substantial benefits of arbitration to both parties, and their ability to keep down the costs of shipping the materials and goods that are the lifeblood of the national economy. This serious blow to the strong "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), urgently demands this Court's review.

REASONS FOR GRANTING THE PETITION

I. The Business Relationships Between Motor Carriers and Independent Owner-Operators Are Crucial to the Trucking Industry, and This Court's Review Is Necessary to Resolve the Split Among the Circuits on the FAA's Applicability to Them.

A. In the trucking industry, the use of "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and economically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them,

commonly referred to as owner-operators."). More than sixty years ago, this Court noted the trucking industry's extensive use of leased equipment and drivers supplied by owner-operators. *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953) ("Carriers ... have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

Accurate, recent estimates of the number of independent owner-operators are difficult to obtain, but there is no question that they constitute a large segment of the industry. The Owner-Operator Independent Drivers Association—the trade association representing independent owner-operators and professional drivers—boasts over 158,000 members operating more than 240,000 trucks in the U.S. and Canada. *See* "OOIDA: Who We Are," *available at* http://www.ooida.com/WhoWeAre. The Census Bureau's 2002 Vehicle Inventory and Use Survey—the most recent comprehensive inventory of trucks nationwide—counted over 545,000 trucks primarily operated by owner-operators. U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tv-us.pdf. These independent contractors play a crucial role not just in long-haul over-the-road trucking operations, but in every sector of the trucking industry, from moving shipping containers from ports to nearby distribution centers, to nationwide express package delivery.

For trucking companies, independent contractors provide a number of advantages. Independent owner-operators often are mature, experienced drivers who are highly skilled, with proven safety records, and highly motivated. The availability of such owner-

operators and their equipment enables carriers to save on equipment and capital costs, and provides the flexibility necessary to meet fluctuations in demand for trucking services. As the Court has explained,

> [d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). Contracting with independent businesses to supply capacity is, in short, critical to the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuation in demand for hauling freight.

B. Independent contracting provides significant advantages to owner-operators as well. By successfully and skillfully managing operations, an independent contractor can grow his or her own business, whether by productively performing services him or herself, or by hiring employees to provide additional services. *See, e.g.*, Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* 30 (Sept. 2011), *available at* http://www.cbrt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf. Owner-operators who drive their own trucks typically outearn similarly situated employee drivers by a significant margin: as one

industry expert stated, "the average owner-operator fares better than company driver counterparts," with a net income of $51,912 compared to "about $40,000 per year for the same amount of work" by an employee driver. Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013, at 12.

But independent owner-operators have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest—consisting principally of the cost of a power unit and various licensing and insurance fees—trucking provides independent contractors an affordable opportunity to start their own businesses. Entrepreneurial owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their business. Independent contracting in the trucking industry allows owner-operators to be their own bosses, and to nurture their own enterprises. Indeed, some of today's largest trucking companies—including the petitioner here—grew from a single-truck operation. *See* Prime Inc. Company History, http://www.primeinc.com/company-history.

II. Review Is Warranted Because the Decision Below Undermines the Federal Policy Favoring Arbitration, to the Detriment of Motor Carriers and Independent Owner-Operators.

Petitioner explains why the First Circuit erred in holding that the phrase "contracts of employment" in Section 1 encompasses agreements between motor carriers and independent owner-operators. Pet. 13-16. The effect of that holding is to broadly eliminate the

ability of trucking businesses to rely on arbitration under the FAA. As long as the split on the questions presented in this case persist, motor carriers and independent contractors alike will be unable to predict, *ex ante*, whether an agreement to arbitrate disputes will be enforceable, because enforceability will turn on the Circuit within which a claim is brought—a concern that is particularly acute in an industry, like trucking, where workers constantly move across state lines and from one part of the country to another. Between this uncertainty and the forum-shopping that it would encourage, such arbitration agreements will have little, if any, value. This Court's review is urgently needed to provide the trucking industry with clarity, and so that motor carriers and owner-operators can take advantage of the national policy favoring arbitration as an efficient alternative to resolving disputes in court.

A. Success in the trucking industry, for carriers and owner-operators alike, presents any number of challenges, with fierce competition resulting in low margins. Unsurprising, then, that carriers and owner-operators aggressively pursue measures that promote efficiency. Like any number of other businesses, trucking businesses frequently agree to arbitrate disputes that may arise between them in the course of their relationship. Motor carriers and independent contractors turn to arbitration because—as Congress has repeatedly found—arbitration allows parties to avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185, 186; *see also* H.R. Rep. No. 68-96, at 2 (1924) ("the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration");

H.R. Rep. No. 97-542, at 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). As this Court has put it, in arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The decision below ensures that arbitration will be adopted less widely, if at all, in contracts between carriers and independent owner-operators. After all, if the parties to the agreement know that it can be unilaterally repudiated by either party when a dispute arises, they will have little incentive to choose arbitration in the first place. As a result, motor carriers will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation as a means of resolving disputes with owner-operators.

B. But motor carriers are not the only losers under the First Circuit's decision: while the plaintiff in *this case* may have concluded that he would fare better in court than in arbitration, for owner-operators faced with relatively small, individual disputes with a motor carrier, arbitration may well be the only realistic opportunity to vindicate their rights. As the Court has observed, "arbitration's advantages often would seem helpful to individuals ... who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Without recourse to arbitration, someone "who has

only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" is left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281.

The same would be true of any number of inherently individualized disputes that regularly arise between motor carriers and owner-operators—say, a payment dispute over a few thousand dollars. Such a claim (unless it was low enough to be resolved in small claims court) might be too small for an owner-operator to pursue in a potentially long, expensive lawsuit, even if he or she is confident of ultimately prevailing. But such a dispute might very well be worth pursuing in arbitration, where the reduced procedural and evidentiary burdens mean a party can resolve a claim more efficiently and expeditiously than they could in court—depending on the circumstances, perhaps without the expense of a lawyer at all.[1]

In short, for many owner-operators, "it looks like arbitration—or nothing." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It*

---

[1] In principle, owner-operators would be free to simply adhere to an arbitration agreement when they felt that they could vindicate a particular dispute more readily in arbitration than in court, without recourse to enforcement under the FAA. As a practical matter, however, if carriers and contractors cannot count on their arbitration agreements being enforced, they will be unlikely to enter into them in the first place. And even if they do, what's sauce for the goose is sauce for the gander: the First Circuit's holding would allow motor carriers as well as owner-operators to walk away from their arbitration agreements when a dispute arises, if they see a tactical advantage in doing so.

Looks, 41 U. Mich. J.L. Reform 783, 792 (2008). If the First Circuit's decision is allowed to stand, the inevitable result will be that any number of meritorious claims that owner-operators could have cost-effectively vindicated in arbitration will go unremedied.

C. Finally, this disincentive to arbitration is a losing proposition for the shippers and consumers the trucking industry serves. Arbitration permits a business to resolve disputes more cheaply, and those "cost-saving benefits ... are reflected in a lower cost of doing business that in competition are passed along to customers." *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks and citation omitted); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-255 (2006) (arbitration "lower[s] [businesses'] dispute-resolution costs," and this "benefit to business[] is also a benefit to consumers" because "whatever lowers costs to businesses tends over time to lower prices to consumers"). Given the pervasive role of trucking in delivering the goods on which the nation and its economy depend, this is, cumulatively, no small consideration. *See, e.g.*, American Trucking Associations, *American Trucking Trends* 5 (2017) (in 2016, transportation by truck represented 79.8% of the nation's primary shipment freight bill, and 70.6% of domestic tonnage).

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amicus Curiae

October 2017